

Opinion No. 43-4363

August 11, 1943

BY: EDWARD P. CHASE, Attorney General

TO: Dr. James R. Scott, Director, Department of Public Welfare, Santa Fe, New Mexico

In your letter dated August 9, 1943, you refer to H. R. 2934, which appropriates funds for programs within the Department of Labor and was passed and became law July 12, 1943, with the following provisos:

"Provided, That no part of any appropriation contained in this title shall be used to promulgate or carry out any instruction, order, or regulation relating to the care of obstetrical cases which discriminates between persons licensed under State law to practice obstetrics.

"Provided further, That the foregoing proviso shall not be so construed as to prevent any patient from having the services of any practitioner of her own choice, paid for out of this fund, so long as State laws are complied with."

You also inclose a memorandum from the Chief of the United States Children's Bureau dated July 28, 1943, which refers to an opinion of the Attorney General of the United States and question 2 of the memorandum, which is as follows:

"What effect to such provisos have on the power of the State health agencies to prescribe standards which 'discriminate between persons licensed under State law to practice obstetrics'?"

"Answer: None. The opinion of the Attorney General of the United States holds that the provisos prohibit discrimination only on the part of the Children's Bureau and do not affect the powers of the State health agencies to prescribe such standards as they deem appropriate."

In view of these provisos and the memorandum from the Chief of the United States Children's Bureau you ask the following three questions:

1. "Is there anything in the laws governing the State Department of Health that would make it necessary for that Board to alter present plans in respect to purchase of obstetrical care for servicemen's wives in the light of the above listed provisos? Present plan includes purchasing of obstetrical care only by licensed physicians with the degree of M. D.

2. "Would failure to alter present plans in the light of the provisos in the federal legislation place the State Board of Health in the position of being subjected to court

action, by any interested parties to compel inclusion of osteopaths and/or chiropractors in the present State Dept. of Health plan for servicemen's wives?

3. "Would the State Board of Health or its members individually be liable to action under the laws **if they should include -licensed practitioners other than doctors of medicine?** For example, in the event that care of a serviceman's wife by a practitioner other than a doctor of medicine was deemed unsatisfactory by the patient and malpractice action instituted?"

In answer to your first question, under its present broad general powers the State Board of Public Health could follow its present plan of purchasing obstetrical care only by licensed physicians with the degree of M. D. However, the Board should keep in mind the second proviso above set forth and also Section 71-110 of the New Mexico 1941 Compilation, which provides as follows:

"Nothing in this act shall be construed to empower the state department or its representatives to interfere in any manner with the individual's right to select the physician or mode of treatment of his choice; Provided that the sanitary laws, rules and regulations are complied with."

In answer to question No. 2, it is impossible to foretell when court action may be brought against any board or public official; however, in my opinion, such court action would not be successful to compel inclusion of osteopaths in the present plan of the State Board for providing medical care to servicemen's wives unless the patient specifically requests the services of a practitioner otherwise licensed to practice obstetrics and who does not hold a degree of M. D.

Answering question No. 3, if the State Board, under its rules, recommends practitioners, whether doctors of medicine or not, and the patient expresses no desire for a different physician, but acquiesces in the selection made by the State Board, then I fail to see where any malpractice on the part of the attending physician would create any liability against the Board or the individual members thereof for its part in recommending and paying for such services.

By C. C. McCULLOH,

First Asst. Atty. General